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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 894

L. B. VANCE and FORD VANCE, PETITIONERS

v.

ORVILLE FREEMAN, SECRETARY OF AGRICULTURE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the district court (Pet. App. 107a) is not reported. The original opinion of the court of appeals (Pet. App. 119a) is reported at 319 F. 2d 841, and the opinion of the court of appeals denying a petition for rehearing (Pet. App. 120a) is reported at 325 F. 2d 663.

JURISDICTION

The judgment of the court of appeals was entered on June 19, 1963 (Pet. App. 119a). A timely peti-

tion for rehearing was denied on December 18, 1963 (Pet. App. 120a), and judgment was entered on January 9, 1964 (Pet. App. 121a). The petition for a writ of certiorari was filed on March 6, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Secretary of Agriculture is authorized by the Agricultural Marketing Agreement Act of 1937, as amended, in a milk marketing order to require handlers of milk to account to the producer settlement fund with respect to milk which they themselves produce and market.

STATUTE AND REGULATION INVOLVED

The pertinent provisions of the Agricultural Marketing Agreement Act of 1937, as amended, and the Central Mississippi Milk Marketing Order [1] are set forth in the Appendix, pp. 9-12, *infra*.

STATEMENT

The Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, as amended, 7 U.S.C. 601 *et seq.*, authorizes the Secretary of Agriculture to issue regional marketing orders applicable to persons engaged in the distribution of milk and milk products, so as to maintain orderly marketing conditions. 7 U.S.C.

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[1] Order No. 87 (7 C.F.R. 987) was renumbered as 103 on January 1, 1963 (7 C.F.R. 1103, *et seq.*)

602, 608c. Such orders are applicable to "handlers," a term defined in 7 U.S.C. 608c(1) to mean "processors, associations of producers, and others engaged in the handling of * * * " milk, but the Act also provides that no order "shall be applicable to any producer in his capacity as a producer." 7 U.S.C. 608c (13)(B).

The order involved in this case regulates the marketing of milk in the central Mississippi marketing area. It provides for the classification of milk based upon use, establishment of minimum prices for each class, payment by handlers to producers of a uniform "blend" price for all purchases of milk, and for adjustments in payments among handlers, through a "producer settlement fund," so that each handler's payments for milk will equal the value of the milk handled by him at the minimum class prices fixed under the order. Each handler must file a monthly report with the Market Administrator, indicating the total quantity of milk received by him from all sources, including milk of his own production, and the use made of this milk. On the basis of the data for all handlers, the Market Administrator calculates the "blend" price, which is the minimum price which each pool plant handler must then pay to all his producers, regardless of the uses to which the individual handler puts the milk. If a handler's payments to producers are less than use value for this handler's milk, the handler pays the difference into a producer settlement fund; if the amount received by a handler's producers exceeds the use value of the handler's milk, the dif-

ference is paid to the handler out of the producer settlement fund.[2]

Before April 1, 1957, the order exempted all persons who produced and distributed their own milk, even though they also handled milk which they acquired from sources other than their own farms. In 1957 the order was amended to limit the exemption to persons whose *sole* source of supply is their own production, 22 F.R. 2121; 7 C.F.R. 1103.16, 1103.60.

Petitioners are partners doing business as Vance Dairy in Hattiesburg, Mississippi. They operate a dairy farm and they process, market and otherwise handle the milk produced on their farm as well as milk obtained from other persons.[3] Petitioners contended that the amended order was invalid because it required them to include milk produced on their own farm in the calculation of their obligations to the producer settlement fund. They maintained that 7 U.S.C. 608c(5) authorizes regulation only with respect to milk "purchased" from producers, and that milk obtained by a handler from his own farms is not "purchased" within the meaning of the statute. This claim was rejected by a Judicial Officer (Pet. App. 96a). On statutory judicial review (7 U.S.C. 608c (15)(B)), however, the district court concluded that

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[2] The identical scheme of milk marketing regulation was recently described by this Court in *Lehigh Valley Cooperative Farmers, Inc.* v. *United States*, 370 U.S. 76, 80-81.

[3] The record shows that petitioners have purchased relatively large volumes of milk from pool plants operated by other handlers (Resp. Ex. 1, R. I 63, R. II 244; 18 Agr. Dec. 565, 567).

the Secretary exceeded his authority in requiring petitioners to price and pool the milk which they themselves produced (Pet. App. 107a). The Court of Appeals for the Fifth Circuit reversed in a *per curiam* opinion (Pet. App. 119a), adopting the view of the Third Circuit in *Ideal Farms, Inc.* v. *Benson*, 288 F. 2d 608, certiorari denied, 372 U.S. 965.

ARGUMENT

The court of appeals' decision in this case has applied the governing statute consistently with its remedial objective. The holding is in accord with the Third Circuit's resolution of the identical issue in *Ideal Farms, Inc.* v. *Benson*, 288 F. 2d 608, certiorari denied, Oct. Term, 1962, 372 U.S. 965. There is no conflict in decisions nor any other reason for further review by this Court.

1. Petitioners' claim that the decision conflicts with *Lehigh Valley Cooperative Farmers, Inc.* v. *United States*, 370 U.S. 76, is without merit. The *Lehigh Valley* case concerned the validity of a milk marketing regulation which imposed a "compensatory payment" on the entry of outside milk into a marketing region. The Court concluded that the payment in that case, which placed the outside milk at a competitive disadvantage and made it "economically unfeasible for a handler to bring such milk into the marketing area" (370 U.S. at 84), was invalid under Section 8c(5)(G) of the Act, which prohibits the imposition of economic trade barriers in the regulation of milk marketing.

The present case does not concern "compensatory" payments or outside milk. Petitioners are fully regulated handlers, whose milk is distributed in the marketing area. Their milk qualifies as pool milk; and petitioners are required to account to the producer settlement fund, as are all handlers under this order and under all orders covering marketwide pools.

2. It accords with the purposes of the Act to subject producer-distributors (such as petitioners) who deal in purchased milk in addition to their own to the equalization terms of the order. Since one of the purposes of the marketing plan is to protect milk producers from competition for premium outlets by allocating these outlets among all producers, see *Lehigh Valley*, 370 U.S. at 81, a complete exemption for producer-distributors might undermine the scheme.[4] In general, producer-distributors deal in high-return milk, which is distributed for fluid use. If they are not required to make payments into the producer settlement fund with respect to their own milk, they could effectively throw the major burden of the sur-

[4] The exemption retained in Sections 987.16 and 987.60 of the amended order was based on the finding with respect to the volume of own-farm production and the lack of evidence to show any disrupting effect on marketing activities in the area. Petitioners' contention that it was incumbent upon the Secretary to make specific findings regarding the *quantity* of disruption caused by producer-handlers who deal in milk other than their own. (Pet. 16-20) is frivolous. In the present case, unlike *United States* v. *Chicago, Milwaukee, St. Paul & Pac. R. Co.*, 294 U.S. 499, there are abundant reasons in the record (*e.g.*, Pet. 88a-91a) to support the Secretary's determination, entirely apart from the quantum of "disruption."

plus or low-return milk on the other area producers. By removing some of the more profitable fluid milk returns from the calculations whereby the "blend" price is determined, such producer-distributors could also depress the uniform price received by the other area producers. See *Nebbia* v. *New York*, 291 U.S. 502, 517-518. Finally, they might have a significant competitive advantage over other area "pool" handlers who must account to the producer settlement fund for high-return sales and who must bear the cost of administering the program.

3. Nor is there substance to the argument that petitioners have not "purchased" milk within the meaning of Sections 8c(5)(A) or 8c(5)(C) when they handle their own milk for distribution. This Court held in *United States* v. *Rock Royal Co-operative, Inc.*, 307 U.S. 533, 580, that "the word 'purchased' means 'acquired for marketing.'" The *Rock Royal* principle, which was formulated in that case in response to the contention that a marketing agent was not a "purchaser," was also applied in *Shawangunk Cooperative Dairies, Inc.* v. *Jones*, 153 F. 2d 700 (C.A. 2), where the court rejected the argument that a gratuitous bailee had not "purchased" milk it held for sale. The Second Circuit construed "purchased" to mean "received" (153 F. 2d at 704), a reading which is consistent with the result here and in *Ideal Farms*. See also *Elm Spring Farm* v. *United States*, 127 F. 2d 920, 927 (C.A. 1).[5]

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[5] *Dairymen's League Co-op. Ass'n* v. *Brannan*, 175 F. 2d 57 (C.A. 2), relied on by petitioners, is inapposite. It involved the construction of a milk order for purposes of

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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May, 1964.

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determining the classification of milk moved from one plant of a handler to another plant of the same handler. As was pointed out by the Third Circuit in *Ideal Farms*, 288 F. 2d at 618, it did not involve a construction of the term "purchased" in Sections 8c(5)(A) and (C) of the Act.

APPENDIX

The Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, as amended, 7 U.S.C. 601, *et seq.*, provides, in pertinent part:

§ 608c. Orders regulating handling of commodity.

* * * * *

(5) *Milk and its products; terms and conditions of orders.*

In the case of milk and its products, orders issued pursuant to this section shall contain one or more of the following terms and conditions, and (except as provided in subsection (7) of this section) no others:

(A) Classifying milk in accordance with the form in which or the purpose for which it is used, and fixing, or providing a method for fixing, minimum prices for each such use classification which all handlers shall pay, and the time when payments shall be made, for milk purchased from producers or associations of producers. Such prices shall be uniform as to all handlers, subject only to adjustments for (1) volume, market, and production differentials customarily applied by the handlers subject to such order, (2) the grade or quality of the milk purchased, and (3) the locations at which delivery of such milk, or any use classification thereof, is made to such handlers:

(B) Providing:

(i) * * * *

(ii) for the payment to all producers and associations of producers delivering milk to

all handlers of uniform prices for all milk so delivered, irrespective of the uses made of such milk by the individual handler to whom it is delivered;

subject, in either case, only to adjustments for (a) volume, market, and production differentials customarily applied by the handlers subject to such order, (b) the grade or quality of the milk delivered, (c) the locations at which delivery of such milk is made, and (d) a further adjustment, equitably to apportion the total value of the milk purchased by any handler, or by all handlers, among producers and associations of producers, on the basis of their marketings of milk during a representative period of time.

(C) In order to accomplish the purposes set forth in paragraphs (A) and (B) of this subsection, providing a method for making adjustments in payments, as among handlers (including producers who are also handlers), to the end that the total sums paid by each handler shall equal the value of the milk purchased by him at the prices fixed in accordance with paragraph (A) of this subsection.

* * * *

(G) No marketing agreement or order applicable to milk and its products in any marketing area shall prohibit or in any manner limit, in the case of the products of milk, the marketing in that area of any milk or product thereof produced in any production area in the United States.

* * * *

(13) *Retailer and producer exemption.*

* * * *

(B) No order issued under sections 601-604, 607, 608, 608a, 608b, 608c, 608d, 608e-1, 608f-612, 613, 614-619, 620, 623, and 624 of this title shall be applicable to any producer in his capacity as a producer.

* * * *

The Central Mississippi Milk Marketing Order, effective April 1, 1957 (22 F.R. 1589, 2049, 2121, as set forth in 7 C.F.R. 1103, *et seq.*), provides in pertinent part:

* * * *

§ 1103.9 Pool plant.

"Pool plant" means either a distributing plant or a supply plant, except a plant operated by a producer-handler.

* * * *

§ 1103.16 Producer-handler.

"Producer-handler" means any person who operates a dairy farm and a distributing plant which, during the month, received no other source milk (except own production), producer milk, or milk from a pool plant.

* * * *

§ 1103.60 Producer-handlers.

Sections 1103.40 to 1103.46, 1103.50 to 1103.54, 1103.61, 1103.62, and 1103.70 to 1103.72, 1103.80 to 1103.83, and 1103.90 to 1103.98 shall not apply to a producer-handler.

* * * *

§ 1103.96 Producer-settlement fund.

The market administrator shall establish and maintain a separate fund known as the

"producer-settlement fund" into which he shall deposit all payments made by handlers pursuant to §§ 1103.62, 1103.93 and 1103.97, and out of which he shall make all payments pursuant to §§ 1103.93 and 1103.98: *Provided*, That any payments due to any handler shall be offset by any payments due from such handler.

Prior to the April 1, 1957, amendment (22 F.R. 2121), the terms of section 1103.16 provided as follows:

§ 987.16 *Producer-handler.* "Producer-handler" means any person who operates a dairy farm and a distributing plant which, during the month, has no other source milk (except own production) or producer milk.

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